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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

I. INTEREST OF THE *AMICI CURIAE* 1

II. SUMMARY OF ARGUMENT 3

III. FEDERAL PUBLIC POLICY PRECLUDES KAISER FROM ASSERTING THE "ILLEGALITY" DEFENSE 4

A. The Trust Funds Constitute A Special Class of Beneficiaries Accorded Preferential Treatment Under Federal Law And Federal Public Policy 4

B. Because of Federal Public Policy and the Preferential Treatment Accorded Trust Funds, Kaiser Cannot Raise the Illegality Defense In This Action 7

IV. IF KAISER IS PERMITTED TO CHALLENGE THE LEGALITY OF THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT ACTION, IT WILL HAVE SUCCESSFULLY CIRCUMVENTED BOTH THE COLLECTIVE BARGAINING PROCESS AND ITS OWN CONTRACTUAL OBLIGATIONS 9

V. IF KAISER IS PERMITTED TO RAISE A SECTION 8(e) DEFENSE IN THIS ACTION, THE PRINCIPLE OF PRIMARY JURISDICTION WILL BE FRUSTRATED 14

VI. CONCLUSION 16

TABLE OF AUTHORITIES

CASES	PAGE
Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)	6
Boyle v. North Atlantic Coal Corp., 331 F. Supp. 1107 (W.D. Pa. 1971)	7
Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947)	8
Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975)	13, 15, 16
Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979)	4, 6, 7, 10, 16
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	4, 8, 11, 13
Lewis v. Harcliff Coal Co., 237 F. Supp. (W.D. Pa. 1965)	7
Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962)	7, 13
Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968)	7
Lewis v. Splashdam By-Products Corp., 233 F. Supp. 47 (W.D. Va. 1964)	7
McMullen v. Hoffman, 174 U.S. 639 (1899)	8
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	14
Mullins v. Kaiser Steel Corp., 642 F.2d 1302 (D.D.C. 1980)	13
NLRB v. Amax Coal Co., ____ U.S. ____, 101 S. Ct. 2789 (1981)	12
NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981)(*en banc*)	11
National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal, ____ F.2d ____, No. CA 78-1761 (D.C. Cir. 1981)	12
New Dyckman Theatre Corp. v. Radio Keith Orpheum, 16 F.R.D. 203 (S.D.N.Y. 1954)	13
Pennington v. United Mine Workers of America, 325 F.2d 804 (6th Cir. 1963), *rev'd on other grounds*, 381 U.S. 657 (1965)	7

CASES — PAGE

San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959) 14, 15

Sears, Roebuck and Company v. San Diego District Council of Carpenters, 436 U.S. 180 (1978) 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 5

Todd Shipyards Corp. v. Indus. Union of Marine & Ship Building Workers of America, 344 F.2d 107 (2d Cir. 1965) 13

Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) 12

United States v. Carter, 353 U.S. 210 12

United States Steel Corporation v. UMW, No. CA 75-1966 (D.D.C. 1977) 13

Viacom International, Inc. v. Tandem Productions, Inc. 526 F.2d 593 (2d Cir. 1975) 7, 11, 13

Waggoner v. Dallaire, ____ F.2d ____, No. CA 79-3542 (9th Cir. 1981) 12

Waggoner v. R. McGray, Inc. 607 F.2d 1229 (9th Cir. 1979) 7, 15, 16

STATUTES

Labor Management Relations Act of 1947, as amended:

29 U.S.C. § 185 15

29 U.S.C. § 186(c) 2, 3

National Labor Relations Act, Section 8(e), 29 U.S.C. § 158(e) ... 4

OTHER AUTHORITIES

A. Corbin, Contracts (One Vol. Ed. 1952) §§748, 754 6

Epstein, *Taft-Hartley Funds Coming of Age, Pensions & Investments*, October 18, 1979 6

Restatement of the Law of Contracts §140 (1932) 4

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This brief in support of respondents is submitted with the written consent of counsel to both parties filed with the Clerk of the Court and pursuant to Rule 36.2 of the Rules of the Supreme Court.

I.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Construction Laborers Trust Funds and Carpenters Trusts Funds are comprised of the following employee benefit plans:

Construction Laborers Pension Trust for Southern California

Laborers Health and Welfare Trust for Southern California

Construction Laborers Vacation Trust for Southern California
Laborers Training and Retraining Trust for Southern California
Carpenters Pension Trust for Southern California
Carpenters Health and Welfare Trust for Southern California
Eleven County Carpenters Vacation Savings and Holiday Plan
Carpenters Joint Apprenticeship and Training Committee Fund for Southern California

Each of these trusts is a multiemployer employee benefit plan created pursuant to collective bargaining between employers and unions; each was organized and is administered pursuant to the provisions of section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c).

The Construction Laborers Trust Funds and the Carpenters Trust Funds receive contributions from employers on behalf of covered employees pursuant to collective bargaining agreements entered into by various employers' associations and the Laborers International Union of North America, AFL-CIO and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, respectively.

Over 22,000 carpenters are active participants in the Carpenters Pension Trust for Southern California. More than 12,000 individuals have retired and are currently receiving benefits from that Trust. The Construction Laborers Pension Trust for Southern California includes more than 25,000 active participants. Currently, in excess of 7,200 retired laborers are receiving pension benefits from that Trust.

Contributions to the Construction Laborers Trust Funds are made by approximately 3,000 employers. The Carpenters Trust Funds receive contributions from more than 2,700 employers.

Both the Construction Laborers Trust Funds and the Carpenters Trust Funds maintain active collection programs to enforce the right of the Trusts to receive contributions from employers that are delinquent in their contractually-required payments. These trusts routinely encounter the same types of defenses to their collection actions that have been raised by the petitioner in the present action.

II.

SUMMARY OF ARGUMENT

Amici wish to press three essential points of concern to all Taft-Hartley trust funds[1]:

(a) Common law principles of contract law do not apply in this case. Under federal law, Taft-Hartley trust funds are given a protected status. For this reason, federal law does not permit petitioner Kaiser Steel Corporation to raise "illegality" defenses to a collection action brought by a trust fund. Moreover, even under a common law analysis, public policy precludes Kaiser from raising an "illegality" defense.

(b) If Kaiser is permitted to litigate the "illegality" defense in the present action, the entire collective bargaining process contemplated by federal labor law will have been circumvented. Further, under federal labor law and policy and the terms of its agreement, Kaiser is obligated to raise the illegality of the "purchase of coal" excuse only in a context that would permit negotiation of an economically equivalent substitute. It failed to do so and is thus prevented from arguing illegality now.

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[1] The term "Taft-Hartley trust funds" is a shorthand expression used to refer to employee fringe benefits trusts established pursuant to collective bargaining and administered pursuant to the strictures of section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c). ("The Taft-Hartley Act" or "LMRA").

(c) Under the doctrine of primary jurisdiction, Kaiser cannot litigate the issue whether the "purchase of coal" clause violates section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), in this proceeding.

III.

FEDERAL PUBLIC POLICY PRECLUDES KAISER FROM ASSERTING THE "ILLEGALITY" DEFENSE

A. *The Trust Funds Constitute A Special Class of Beneficiaries Accorded Preferential Treatment Under Federal Law And Federal Public Policy.*

In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), this Court established the principle that Taft-Hartley trust funds are a special type of beneficiary of collective bargaining agreements. At common law, a promisor could assert any defense against a third party beneficiary that he could assert against the original promisee.[2] However, in *Lewis*, this Court refused to permit an employer to offset damages it claimed to have suffered as a result of the union's breach of its collective bargaining agreement against the employer's obligation to make trust fund contributions.

The Court held:

> This collective bargaining agreement, however, is not a typical third party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty. It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. . . .

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[2] *See Restatement of the Law of Contracts* § 140 (1932), cited in *Huge v. Long's Hauling, Co.*, 590 F.2d 457, 459 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

> Moreover, unlike the usual third party beneficiary contract, this is an industrywide agreement involving many promisors. If Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country.

361 U.S. at 469.

Similarly, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), this Court held that in suits, such as this, under section 301 of the LMRA, the law that must be applied is "federal law, which the courts must fashion from the policy of our national labor laws."

The *Lewis* and *Lincoln Mills* holdings demonstrate that common law contract principles cannot be applied to trust fund collection disputes arising from collective bargaining agreements unless they are consistent with the federal law and policy favoring trust funds.

Significant reasons exist for the special judicial protection accorded Taft-Hartley trusts:

> With both the number of Americans in retirement and the duration of those nonremunerated years of their lives increasing, and with the cost of health care soaring, it has become ever more important to provide for those situations where the cost of living will no longer be satisfied from anticipated income . . . for millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment and old age has been the union welfare and pension funds. . . . [E]nsuring the viability of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government . . . .

Huge v. Long's Hauling Co., 590 F.2d 457, 464-65 (3d Cir. 1978) (Adams, J., concurring), *cert. denied*, 442 U.S. 918 (1979).

The employees relying on the viability of these funds currently number more than 9.6 million.[3] Today, the 25 largest Taft-Hartley trust funds hold accumulated assets in excess of 11 billion dollars — a monumental sum, but one that pales in comparison to the magnitude of the future benefits promised by these trust funds. To fulfill their benefit promises, these trusts must receive the contributions committed by employers in the collective bargaining process.

Retired beneficiaries of trust funds are wholly dependent upon the ability of the trusts to secure these funds. Retirees are outside the collective bargaining unit and do not have even an indirect voice in the collective bargaining process. *See Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Employers promise to contribute to trusts as consideration for the labor of their employees, the participants in the trusts. If contributions are not received for this labor, a potential forfeiture is created. This runs counter to the general judicial policy of avoiding forfeitures. *See* A. Corbin, Contracts (One Vol. Ed. 1952) §§ 748, 754. More importantly, in the special context of federal labor policy, the courts have recognized that it is fundamentally unfair for an employer to "surprise" employees by disavowing its obligation to make contributions after the employees have already performed their work. *Huge v. Long's Hauling Co.*, 590 F.2d at 465 (Adams, J., concurring).

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[3] Epstein, *Taft-Hartley Funds Coming of Age, Pensions & Investments*, October 8, 1979. The same source notes that the United Auto Workers Pension Fund has over 330,000 retirees; the International Brotherhood of Electrical Workers has approximately 60,000 retirees; the United Mine Workers have approximately 85,000 retirees.

B. *Because of Federal Public Policy and the Preferential Treatment Accorded Trust Funds, Kaiser Cannot Raise the Illegality Defense In This Action.*

"The trustees of the fund, although technically third party beneficiaries, often can avoid contractual defenses that could be asserted against the union itself." *Huge v. Long's Hauling Co.*, 590 F.2d at 459. The majority of circuit court and district court opinions which have considered the issue have held that an employer may not, in the first instance, challenge the legality of provisions of a collective bargaining agreement as an affirmative defense to an action brought by trustees of a Taft-Hartley trust to collect delinquent contributions. *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979); *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Pennington v. United Mine Workers of America*, 325 F.2d 804 (6th Cir. 1963), *rev'd on other grounds*, 381 U.S. 657 (1965); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Boyle v. North Atlantic Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971); *Lewis v. Harcliff Coal Co.*, 237 F. Supp. (W.D. Pa. 1965); *Lewis v. Splashdam By-Products Corp.*, 233 F. Supp. 47 (W.D. Va. 1964).

This is not the first case in which courts have refused to consider a claim of illegality, founded upon an antitrust violation or otherwise, because it is untimely or made in litigation in which the alleged wrongdoer is not present. For example, in *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), the court of appeals affirmed the refusal of a district court to entertain an antitrust defense to an action brought by an assignee of a contract controlling syndication and distribution rights to a television series. The court held that "other policies may override the need to prevent antitrust violations by not enforcing the contracts, where as here, the antitrust laws may be vindicated in a separate action." *Id.* at 598. The court further held:

> That procedure may be particularly appropriate where, as here, the alleged wrongdoer under the antitrust laws is not a party to the contract in dispute.

Id. See also Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947).

Kaiser's brief is based on the assumption that this case is governed not by federal labor law, but by a purportedly simple *common law* rule: "Courts will not enforce illegal contracts." Kaiser apparently believes that if it repeats this "rule" often enough, it can obscure its limitations and exceptions. *See, e.g.*, Brief of Petitioner at 11, 18, 19, 21-22. Further, Kaiser errs in assuming that a common law rule applies in a labor law context. In this case, as in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), "a consideration which is not present in the case of other third-party beneficiary contracts is the impact of national labor policy." *Id.* at 470.

Even under a common law analysis, Kaiser is wrong. Kaiser places its principal reliance on the case of *McMullen v. Hoffman*, 174 U.S. 639 (1899), which refused to enforce a contract to share the profits from an illegal bid-rigging scheme. However, the *McMullen* opinion recognizes significant exceptions to the illegality defense, for example, where a party "had nothing to do whatever with the illegality of the original contract." *Id.* at 659. Moreover, the *McMullen* court denied enforcement of the contract before it only because it found that enforcement would yield a result contrary to public policy. In this case, the court of appeals found that public policy *requires* Kaiser to make the employee benefit contributions that it promised to make.

Kaiser fails to consider the most significant part of the *McMullen* opinion:

> The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but *only on account of the public interest.* It has been often stated in similar cases that *the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations, and in order the better to secure the public against dishonest transactions.*

Id. at 851 (emphasis added).

Significantly, Kaiser never takes issue with the holding of the court of appeals that strong public policy considerations require Kaiser to make the employee benefit contributions that it promised to make. As Kaiser appears to concede, all public policy considerations must be resolved in the Trustees' favor. No public policy reason exists for permitting Kaiser to raise an illegality defense.

IV.

IF KAISER IS PERMITTED TO CHALLENGE THE LEGALITY OF THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT ACTION, IT WILL HAVE SUCCESSFULLY CIRCUMVENTED BOTH THE COLLECTIVE BARGAINING PROCESS AND ITS OWN CONTRACTUAL OBLIGATIONS.

Kaiser argues at length that if the lower court is deprived of authority to hear Kaiser's affirmative defenses on the merits, the courts' power to hear and dispose of the entire controversy will have been unconstitutionally infringed. Brief of Petitioner at 44-47. Thus, Kaiser maintains, it is left with "the prospect that [it] may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." Brief of Petitioner at 45; (emphasis in original).

Kaiser's argument completely misses the point. The issue is not *whether* Kaiser can challenge the legality of its collective bargaining agreement under federal labor and antitrust laws, but *when* and *against which parties* it may do so (and in *what forum, see* section V, *infra*).

If it desired to contest the "purchase of coal" clause, Kaiser should have sued the Union *during* the life of the contract and for *prospective* rather than retroactive relief. Nothing in the opinion of the court of appeals suggests that Kaiser would have

been deprived of its right to litigate the illegality issue if it had brought such a timely action against the Union. To the extent that Kaiser now has no way to avoid making payments under the "purchase of coal" clause, it has no one but itself to blame.

As Judge Adams stated in his concurrence in *Huge v. Long's Hauling Co.*, 590 F.2d at 465:

> Finally, it appears preferable as a matter of judicial administration to *require that the employer sue the union directly* if it believes it has reason to be excused from performing under the labor agreement, instead of permitting it to assert its claim by way of defense against the trustees. The employer dealt with the union and bases its case on those dealings. Clearly, the enforceability of the labor agreement can better be ascertained in the context of a lawsuit to which the principal actors are parties than in one where one party, the trustees, does not have first-hand knowledge of the material facts.

(Emphasis added) (footnote omitted).

In this case, Kaiser appears to have expressly covenanted with the Union to resolve any objections to the "purchase of coal" clause by direct action against the Union *during* the life of the contract. Kaiser agreed to the very clause which it now contests. It further agreed expressly in the collective bargaining agreement to negotiate a substitute for the clause if it was held unlawful. Brief of Petitioner at 5.

Kaiser not having obtained a finding that the clause was unlawful during the life of the contract, the Union had no need or means to renegotiate any form of substitute consideration for the labor rendered by its members. Kaiser's time for voicing its objection passed as the contract passed.

Given the terms of its collective bargaining agreement, Kaiser must be held to have bargained away any right it might have had to raise the alleged illegality of the "purchase of coal"

clause as a defense to the Trustees' collection action. This Court held, in a similar context, that "the parties to a collective bargaining agreement must express their meaning in unequivocal words" before they can be said to have agreed that an employer can raise unlawful union conduct as a defense in a trust fund collection action. *Lewis v. Benedict Coal Corp.*, 361 U.S. at 470-71. The principle of the *Lewis* case applies here. Kaiser did not "in unequivocal words" preserve the right to challenge the "purchase of coal" clause outside of the collective bargaining context. Thus, it cannot now do so.

To permit Kaiser to do otherwise would be manifestly inequitable. An employer demonstrates an intention to be bound by the terms and obligations of a collective bargaining agreement when it receives the benefits and appears to abide by the provisions of that agreement. *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 356 (5th Cir. 1981) (*en banc*). By choosing not to protest the "purchase of coal" clause during the life of the agreement at a time when the Union could have negotiated substitute compensation as agreed, Kaiser created the expectation in its employees that they would be compensated in the manner prescribed by the agreement.

Thus, Kaiser partook of the benefit of labor peace and the right to employ union labor and secured the actual performance of labor over the entire life of the collective bargaining agreement. Having enjoyed the benefit of its bargain, Kaiser cannot now refuse to pay the price. In the words of the Second Circuit, Kaiser cannot "reap the benefits of a contract and then seek to avoid the corresponding burdens." *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d at 599.

A holding to the contrary in this case will enable Kaiser to repudiate its obligation to contribute after the contract has expired. It will result in Kaiser receiving the labor of its work force for a price hundreds of thousands of dollars less than that which it agreed to pay under the collective bargaining agreement. In these circumstances, equity requires that Kaiser be

estopped to raise the illegality defense. *See National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal,* ____ F.2d ____, No. CA 78-1761 (D.C. Cir. 1981).

Broader considerations support the equity of denying Kaiser's illegality defense. Trustees are ill-equipped to litigate issues which only the collective bargaining parties can properly resolve. The trustees of a Taft-Hartley trust are not "collective bargaining representatives" of either the union or the employer. *NLRB v. Amax Coal Co.,* ___ U.S. ____, 101 S. Ct. 2789 (1981)[4]. Moreover, as a matter of federal law, neither the union nor its representatives are agents of the trust funds created by a collective bargaining agreement. *Waggoner v. Dallaire,* ____ F.2d ____, No. CA 79-3542 (9th Cir. 1981). Trustees owe their undivided loyalty to the trust funds and their participants. *NLRB v. Amax Coal Co., supra.* Consequently, the trustees must live with the language of a collective bargaining agreement which they did not construct and whose legal infirmities they cannot remedy.

Yet, trust funds must monitor and enforce[5] the contribution obligations of a multitude of employers.[6] To permit Kaiser to raise its defense in this action is to offer every employer the opportunity to "lie in the weeds," ignoring its obligation to contribute, with the knowledge that if it is discovered it will have the independent ability to raise in defense complex and abstruse questions of labor and antitrust law. As the court of appeals noted in this case, the litigation of

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[4] This is true even if, in some cases, collective bargaining representatives also serve as trustees. In their capacity as trustees, they are obligated by federal law to exercise their independent judgment in administering a Taft-Hartley trust. *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975).

[5] "Indeed, the Trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the Fund.' *United States v. Carter,* 353 U.S. 210, 220." *NLRB v. Amax Coal Co.,* ____ U.S. ____, ____, 101 S. Ct. 2789, 2798 (1981) (Emphasis in original)

[6] As stated earlier, *amici* collectively receive contributions from and must monitor more than 5,000 employers.

difficult antitrust and labor law issues is a time-consuming and expensive process. Forcing the trustees to deal with these complex issues entails the potential dissipation of trust fund assets on litigation costs. The injection of these issues into simple collections actions would increase the cost of litigation manifold.[7]

Kaiser's lament that affirmance of the decision below will deprive it of a judicial forum simply cannot withstand scrutiny. Kaiser's collective bargaining agreement reveals the means by which the legality of the "purchase of coal" clause could be tested. It would have been a simple matter for Kaiser to litigate the issue in a prospective manner by filing a declaratory relief action against the United Mine Workers.[8] Then, if Kaiser had prevailed, the parties could have negotiated the substitute consideration as called for by their agreement.

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[7] As one district court has noted, an antitrust claim "becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pretrial proceedings on collateral issues . . ." *New Dyckman Theatre Corp. v. Radio Keith Orpheum*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954). The Second Circuit confirms "[i]t is well known that the litigation of antitrust issues is more likely to involve lengthy and expensive proceedings, both before trial and at trial, than any other kind of federal court litigation." *Viacom International, Inc. v. Tandem Productions*, 526 F.2d 593, 599 (2d Cir. 1975). In view of the policy expressed in *Lewis v. Benedict Coal, Corp.*, 361 U.S. 459 (1960) that trust fund beneficiaries should be shielded from the consequences of union and employer wrongs, the legal cost of defending the legality of the collective bargaining agreement should not be extracted from trust fund assets. *See also Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962) (the purpose of *Lewis v. Benedict Coal Corp.* was to insulate beneficiaries of the trust fund from consequences of breach of contract by either union or trustees).

[8] That is what the employers did in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and in *Todd Shipyards Corp. v. Indus. Union of Marine & Ship Building Workers of America*, 344 F.2d 107 (2d Cir. 1965). In fact, one employer bound by an agreement containing the "purchase of coal" clause *did* file suit against the UMW to obtain declaratory relief; the suit resulted in a judgment that the purchase of coal clause *did not* violate the Sherman Act; *United States Steel Corporation v. UMW*, No. CA 75-1966 (D.D.C. 1977), cited in *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1312 (D.D.C. 1980).

However, Kaiser rejected this route. Instead, it chose to gamble that the Trustees would never seek to collect the money owed to the Trust under the purchase of coal clause.

V.

IF KAISER IS PERMITTED TO RAISE A SECTION 8(e) DEFENSE IN THIS ACTION, THE PRINCIPLE OF PRIMARY JURISDICTION WILL BE FRUSTRATED.

The desire to shield the system of national labor relations from conflicting regulation prompted this Court to hold:

> When an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

The Court has recognized the need for this doctrine of primary jurisdiction to delineate areas of conduct that must be free in the first instance from state and federal court regulation if national labor policy is to be left unhampered. The Court's decisions have adopted a policy of avoiding "conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[9] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. at 246.

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[9] Underlying this logic is more than just a concern to avoid conflicting decisions. The Court has recognized that conflict in technique can be fully as disruptive to the system of national labor laws as conflict in overt policy, for "[t]he technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." *Motor Coach Employees v. Lockridge*, 403 U.S. at 287. Indeed, "[a]dministration is more than a means of regulation; administration is regulation." *San Diego Building Trades Council v. Garmon*, 359 U.S. at 243.

Application of the primary jurisdiction doctrine is especially appropriate in this case.[10] In the recent case of *Sears, Roebuck and Company v. San Diego District Council of Carpenters*, 436 U.S. 180, 202 (1978), this Court restated the rule that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." The same rule applies to the federal courts. *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1233, n. 4 (9th Cir. 1979); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. at 245. Here, Kaiser's assertion that the "purchase of coal" clause violates section 8(e) of the National Labor Relations Act raises precisely the same issues and questions which the NLRB would have decided if Kaiser had initially brought an unfair labor practice charge before the Board.

In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975), this Court held that federal courts may decide labor law questions that emerge as collateral issues in suits brought under other federal statutes. However, *Connell* is inapposite here, where the section 8(e) issue forms a wholly separate defense to enforcement of the collective bargaining agreement.

In *Connell* the employer signed, under protest, an allegedly illegal subcontracting agreement with the union, then immediately brought a federal antitrust action against the union in an effort to void the agreement. The union contended that the agreement was explicitly allowed by the "construction industry proviso" to section 8(e) and was therefore immune to federal antitrust challenge. Thus, before the Court could determine whether the employer's antitrust claim was valid, it had to decide the collateral section 8(e) issue raised by the union.

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[10] Under section 301 of the LMRA, 29 U.S.C. § 185, state courts have concurrent jurisdiction with federal courts over collections actions brought by the trustees of Taft-Hartley trusts against delinquent employers. It is particularly inappropriate for state courts, with virtually no expertise in interpreting the National Labor Relations Act to become involved in the intricacies of section 8(e) and other highly technical provisions of the Act.

Here, in contrast, Kaiser is raising section 8(e) as a wholly separate, alternative defense, distinct from the antitrust defense. There is no need to decide the section 8(e) issue before the separate antitrust issue can be addressed. *Huge v. Long's Hauling Co.*, 590 F.2d at 461.

Additionally, in *Connell* there was no claim that section 8(e) had been violated. Rather, the union asserted that section 8(e) *protected* the agreement from the antitrust laws. The NLRB could not have made such a determination, since it does not have jurisdiction to decide the scope of section 8(e), absent an unfair labor practice charge before it. Therefore, the collateral labor law issue could not have been addressed by the Board in *Connell*. Here, Kaiser could have brought the section 8(e) issue before the Board, but chose not to do so.

In effect, by foregoing its opportunity to bring an unfair labor practice charge before the NLRB and instead belatedly trying to assert section 8(e) as collateral matter, Kaiser is attempting (long after expiration of the National Labor Relations Act's six-month statute of limitations) to "bootstrap itself into a position to litigate in district court claims within the NLRB's primary jurisdiction simply by adding unrelated antitrust allegations." *Huge v. Long's Hauling Co.*, 590 F.2d at 461. Allowing Kaiser to assert a section 8(e) violation as a collateral matter would usurp the NLRB's primary jurisdiction and open the door for any party to litigate labor law claims within the Board's primary jurisdiction in federal court by just tacking on a separate antitrust claim. Such a holding would "encourage parties to circumvent the congressionally-established scheme for resolution of unfair labor practice disputes by the NLRB." *Waggoner v. R. McGray, Inc.*, 607 F.2d at 1236.

VI.

CONCLUSION

Amici curiae urge this Court to find that Kaiser has raised its claims against the wrong parties, at the wrong time and in the wrong forum.

A finding in favor of Kaiser will necessarily encourage employers to enter into collective bargaining agreements, thereby purchasing labor peace, while harboring no intention of paying the agreed-upon price. Further, to allow an employer to assert his objections to a collective bargaining agreement retroactively as defenses to his obligation to contribute for labor already performed is to reward deceit and encourage *every* delinquent employer to ignore its obligations until discovered and then, if discovered, to protract and complicate the trusts' collection actions with whatever objections can be manufactured.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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